No. 80-696

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TRANSFER & STORAGE CO.,
Petitioner,

versus

RAYMOND J. BROWN,
Respondent.

On Writ of Certiorari to
The Supreme Court of Texas

BRIEF AS AMICI CURIAE OF SOUTHWEST WAREHOUSE & TRANSFER ASSOCIATION AND OTHER INTERESTED MOTOR CARRIERS

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BRIEF AS AMICI CURIAE OF SOUTHWEST WAREHOUSE & TRANSFER ASSOCIATION AND OTHER INTERESTED MOTOR CARRIERS

Southwest Warehouse & Transfer Association, Inc.; United Van Lines, Inc.; Allied Van Lines, Inc.; North American Van Lines, Inc.; Central Freight Inc. and Central Forwarding Inc. hereby respectfully file the following Amici Curiae Brief in support of the petition

for a Writ of Certiorari filed by American Transfer & Storage Co.

INTEREST OF AMICI

The amici curiae are Southwest Warehouse & Transfer Association, Inc.; United Van Lines, Inc.; Allied Van Lines, Inc.; North American Van Lines, Inc.; Central Freight Inc. and Central Forwarding Inc. Southwest Warehouse is an association of 144 moving and storage companies with principal offices in Texas, Louisiana, New Mexico, Oklahoma and Arkansas. By far the majority of the members are movers of household goods headquartered in Texas. United Van Lines, of Missouri; Allied Van Lines, of Illinois and North American Van Lines, of Indiana are three of the larger carriers of household goods in the United States. Central Freight, of Waco, Texas, is a common carrier of general commodities, and its sister company, Central Forwarding Inc., also of Waco, Texas, is authorized to carry household goods.

Each of the amici conducts business in Texas. A substantial portion of the business of each involves interstate commerce, which produces combined annual revenues in the hundreds of millions of dollars. All of the amici operate not only in Texas but throughout the United States, either directly or through the interlining of shipments with other carriers. If the decision in question of the Texas Supreme Court is allowed to stand, each of the amici and their interstate commerce

businesses will be subject to and adversely affected by the mandatory multiple damage provisions of the Texas Deceptive Trade Practices and Consumer Protection Act (Tex. Bus. & Comm. Ann. §17.41, et seq.) (DTPA).

The amici are, therefore, vitally interested in the outcome of this litigation and urge that this Court consider the petition.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the Texas Supreme Court for two reasons:

1. There are conflicts between the Carmack Amendment and the Texas DTPA which the Texas Supreme Court has either ignored or sought to distinguish on superficial grounds.

2. The application of the Texas DTPA to interstate shipments will have widespread and profound effects on carriers and shippers not only in Texas but throughout the entire United States and will materially and adversely affect uniformity in rates and damages sought to be achieved by the Carmack Amendment.

I.

There Are Conflicts Between The Carmack Amendment And The Texas Deceptive Trade Practices Act Which The Texas Supreme Court Has Either Ignored Or Sought To Distinguish On Superficial Grounds.

The principal reason relied on by the Texas Supreme Court for holding the Carmack Amendment [49 U.S.C. §20(11)] inapplicable appears to be the following:

> [A] DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations. (601 S.W.2d at 938).

Respondent Brown urges similarly that his cause of action "exists separate and apart from the contract of carriage and is totally unrelated thereto." (Respondent's Brief in Opposition, p. 11).

Perhaps, speaking theoretically, it may be argued that the representations in question were totally unrelated to the contract of carriage. This is understandable when respondent's desire to obtain treble damages, as opposed to released value damages, is considered. Amici curiae submit, however, that such distinction is superficial and will not withstand scrutiny.

The representations in question cannot be viewed in a vacuum. They are directly related to the nature and

quality of services to be rendered in an interstate contract of carriage. The representations themselves do not cause damage or injury to anyone. Had respondent decided not to use the services of petitioner, and had no contract been entered into, or if petitioner had shipped the goods without damage, then, obviously, there would be no lawsuit. It is only as a result of entering into the interstate contract of carriage and the subsequent damage to property during the interstate move that respondent was injured and has a cause of action. To say that the contract of carriage is "totally unrelated" to the cause of action is sophistry at its extreme.

It might be argued as a ground for distinction that causes of action under the DTPA are akin to fraud and that the state has a deep rooted interest to protect its citizens against such acts, as was stated by the Texas Supreme Court (601 S.W.2d 938). Amici curiae respectfully disagree with this holding in that if there is a true conflict between the state statute and the federal statute whereby the former impairs the federal superintendence of the field, the state statute cannot stand, no matter how deeply rooted the local interest.

While the Texas DTPA is frequently mentioned as an anti-fraud statute, no fraudulent intent, or intent of any nature, is required for there to be a violation or an awarding of multiple damages. In the recent Texas Supreme Court case of *Singleton v. Pennington*, 23 Tex. Sup. Ct. J. 587 (Sept. 20, 1980) the plaintiff accused the defendant of violating the same subsections of the

Texas DTPA as are involved in this case. [§17.46(b)(5) and (7)]. The defendant urged that he should not be held liable for mandatory treble damages for representations if he did not know that they were false. The Supreme Court disagreed and held that it "would not read into [Subsections 5 and 7] an intent requirement. . . ."

The article of a noted expert in the area emphasizes that it is a misconception that there must be fraud, deception or misleading conduct for there to be a violation of the Deceptive Trade Practices Act. Elias, *The DTPA: The All-encompassing Buyer Remedy in Texas,* 43 Tex. B.J. 745 (1980). The buyer has the option of a DTPA suit "when product quality or performance is defective or inadequate, *regardless of whether the seller was guilty of any deceptive or misleading conduct in making the sale.*" (*Id.* at 745) (Emphasis added). He later states: "The seller's knowledge, intent, or general state of mind is irrelevant. Thus, an innocent misrepresentation is as much a violation of DTPA §17.46(b)(7) as an intentional one. See *Spradling v. Williams,* 566 S.W.2d 561 (Tex. 1978)." (*Id.* at 754, n. 48).

It should be noted that there were no findings by the jury in the instant case that American Transfer had any fraudulent intent or knowingly made any misrepresentations. The jury found only that American Transfer represented to Brown that the moving services of American Transfer "(1) would include benefits and characteristics which they did not include [Subsection

5]; and (2) were of a particular standard, quality or grade, when in fact, they were not [Subsection 7]."

Much of what is prohibited by the DTPA would, but for inclusion within the Act, traditionally be considered purely a breach of contract. For example, DTPA §17.50 awards multiple damages for breaches of express or implied warranty, usually considered contractual or quasi-contractual. Representations under Subsections 5 and 7 are in essence express warranties. Professor Elias observes that: "the representations [set out in Subsection (7) of §17.46(b)] would probably also create express warranties. . . ." (Elias, *supra*, at 748).

A warranty, of course, is by its very nature, a contract. *Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co.*, 43 F.2d 683, 685 (2d Cir. 1930); *Dunn v. Texas Coca Cola Bottling Co.*, 84 S.W.2d 545 (Tex. Civ. App. - Eastland, 1935, writ dism'd w.o.j.); 77 C.J.S. *Sales* §302c (1952) ["a warranty . . . is itself a contract."]; 67 Am. Jur. 2d *Sales* §425 (1973).

Are the representations by American Transfer in the instant case any less contractual in nature? Does classification of the cause of action by the Texas Supreme Court and respondent as a deceptive trade practice in itself successfully avoid the contractual nature of the representations and applicability of the Carmack Amendment?

This Court has traditionally examined with a careful and an analytical eye similar attempts to circumvent the provisions of the Carmack Amendment by characterizing the cause of action as something other than a breach of the interstate contract. Note the plaintiffs' various suggested causes of action (in parentheses) and this Court's responses. In *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (per curiam) (negligence causing untimely delivery) this Court held that the words of the statute were "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." (*Id.* at 29).

In *Georgia, Florida & Alabama Railway Co. v. Blish Milling Co.*, 241 U.S. 190 (1916) (trover and conversion) this Court chose to recognize the substance, rather than the form, of the asserted cause of action: (*Id.* at 197)

> The action is in trover, but, as the state court said: 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App. p. 147.

Of similar effect is *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923) (trover and conversion): "The law of the United States cannot be evaded by the forms of local practice." (*Id.* at 21).

It is the position of amici curiae that once this Court looks beyond the "technical denomination" placed on respondent's cause of action by the Texas Supreme Court or the "forms of local practice," it will see that the scope and effect of the action is nothing more than one for damages against American Transfer relating to the interstate contract of carriage.

We have found no opinion of this Court which has considered the validity of the application of a statute similar to the Texas DTPA to interstate moves. There is at least one Texas case which has, however, applied the DTPA to facts which this Court has held in another case were governed by the Carmack Amendment.

In *National Van Lines, Inc. v. Lifshen,* 584 S.W.2d 298 (Tex. Civ. App. - Dallas 1979, no writ) (opinion by Chief Justice Guittard), plaintiff sought treble damages under the DTPA based on defendant's representations (in Wisconsin) including "representations concerning the time necessary to complete the move." (*Id.* at 299). Chief Justice Guittard sustained the trial court's award of treble damages, reasoning that the Carmack Amendment did not apply because the case involved acts or practices which occurred "before the parties entered into the contract of carriage." (*Id.* at 300).

We find no material factual distinctions between *National Van Lines* and the facts in the opinions of this

Court in *Atchison, Topeka, & Santa Fe Railway Co. v. Robinson,* 233 U.S. 173 (1914) and of the Fourth Circuit in *Sorensen-Christian Industries, Inc. v. R.E.A.,* 434 F.2d 867 (4th Cir. 1970) where pre-contract representations about the time and quality of the shipment were made but not fulfilled. In both, the Carmack Amendment prevailed. In the latter, R.E.A.'s agent assured plaintiff "that there would be no question of [the shipment's] arriving on time," (*Id.* at 868), but admitted at trial that plaintiff "did not get the service it had paid for." (*Id.* at 869).

The crucial facts of *Robinson, Sorensen,* and *National Van Lines* are the same; only the technical denomination of the cause of action used to circumvent the Carmack Amendment differed.

The DTPA conflicts with the Carmack Amendment not only in the amount of allowable damages, but also in limitations of liability. In this respect, the case of *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913) is in point. In *Adams* Kentucky had enacted a statute nullifying contracts which limited the liability of carriers to declared value. Kentucky's attempt to allow the plaintiff recovery over the declared value was held by this Court to conflict with the Carmack Amendment and, therefore, was invalid.

In the instant case American Transfer also raised the declared value as a limit to its liability. The Texas Supreme Court, (601 S.W.2d at 938) while not directly discussing this point, cited with approval the holding

and reasoning of the Court of Civil Appeals: (584 S.W.2d at 291)

> [W]e hold also that §17.42 [which forbids waivers by consumers of rights under the DTPA] is effective to nullify any contractual limitation of liability insofar as this action is concerned.

Amici curiae submit that the conflict presented by §17.42 of the DTPA, insofar as it relates to interstate contracts of carriage, is, as was held by this Court in *Adams Express*, an impermissible interference with Congress' power in interstate commerce.

II.

The Application Of The Texas Deceptive Trade Practices Act To Interstate Shipments Will Have Widespread And Profound Effects On Carriers And Shippers Not Only In Texas But Throughout The Entire United States And Will Materially And Adversely Affect Uniformity In Rates And Damages Sought To Be Achieved By The Carmack Amendment.

Consider first the magnitude of the damages allowed. The DTPA in effect at the time of the shipment in question called for the mandatory awarding of treble damages and attorney's fees, regardless of intent. *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). *Singleton v. Pennington*, 23 Tex. Sup.Ct. J. 587. Even Chief Justice Guittard of the Court of Civil Appeals, on whose opin-

ion the Texas Supreme Court relied so heavily in the instant case, has stated his view that "the remedy of treble damages is Draconian. . . ," especially where there is no intentional deception. *Singleton v. Pennington*, 568 S.W.2d 367, 372 (Tex. Civ. App. - Dallas 1977).

We emphasize the severity of the remedy allowed at this point not solely for the purpose of demonstrating what Texas parties must face; indeed, the harsh effects are not geographically restricted. The DTPA allows a local defendant to obtain indemnity or contribution from another party causing all or part of the harm (DTPA §17.55A).

Section 17.55A is particularly applicable to the types of transactions under consideration in the instant case, i.e. interstate contracts of carriage. As the Court is no doubt aware, several carriers in different states may be involved in the handling, pickup, transportation or delivery of an interstate shipment. The consumer usually deals only with one of the involved carriers, as Mr. Brown did with American Transfer. It is not necessarily that carrier, however, which commits acts which might be considered deceptive trade practices. For example, the initiating carrier may, based on promises or past practice of a connecting line carrier, in good faith represent that a shipment will be delivered by a certain time or handled in a certain way. If the connecting line carrier fails to perform as represented, the initiating carrier is responsible under the DTPA but

may, if sued by the consumer, seek indemnity from the connecting line carrier for all of the multiple damages and attorney's fees.

The facts just posed are not hypothetical. Evidence in the present case indicates that a connecting carrier in the State of Washington is responsible for some, if not all of the actual damage caused to the shipment. American Transfer has filed suit against that carrier in Washington for indemnity.

In addition, a shipment which is initiated out of Texas and destined for Texas may result in liability for the initiating carrier, even though he may be totally unfamiliar with the Texas DTPA. In *National Van Lines, Inc. v. Lifshen*, 584 S.W.2d 298, the defendant was held liable in Texas for treble damages (including delay damages) as a result of representations made by defendant's agent in Milwaukee, Wisconsin. Every carrier outside of Texas who makes representations, though innocent and in good faith, about the quality or nature of the move to Texas, will face potential damages far in excess of those to which he would be subject for moves to other states.

Consider also the fact that many of the other states have consumer protection statutes of one form or another. The causes of action and damages allowed are not uniform, however. See 2 *Consumer Law Handbook* 180 (1972). Some states allow punitive damages; some do not. Some award civil or criminal penalties; others do not. The differences are, at the very least, numerous.

Quite probably, they are unfathomable to a carrier who must try to ascertain his potential liabilities.

Furthermore, how can a carrier effectively figure his rates when he is subject to treble damages for a shipment to one state, actual damages to another or civil or criminal penalties to a third. If, as stated by this Court in *Southeastern Express Co.*, 299 U.S. at 29, "the underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed," how can he possibly determine his rates without examining the various deceptive trade practices and consumer protection acts for each state through which that particular shipment travels? The broad purpose of the federal act, "to compel the establishment of reasonable rates and to provide for their uniform application" (*Id.* at 29), will become an impossibility.

SUMMARY OF ARGUMENT

The Texas Supreme Court and respondent have woven a fine semantic cloth which merits the closest examination by this Court. The basic reasoning of the Supreme Court of Texas is at the very least superficial and questionable. Yet if the opinion in *American Transfer* is allowed to stand, the results will be widespread and profound. Is the issue so clear that the unquestioned effect on uniformity of rates and liability in interstate

commerce can pass unnoticed and unwritten on by this Court? Can it seriously be argued as suggested by respondent that the representations of American Transfer about the manner in which it would carry out the interstate shipment are "totally unrelated" to the interstate contract of carriage? We think not.

The words of this Court in *Adams Express Co. v. Croninger*, (226 U.S. at 506) are particularly pertinent:

> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which lead to the amendment.

CONCLUSION

Amici curiae urge, due to the obvious and overwhelming importance of the issues presented on the transportation of goods in interstate commerce, that this case warrants the full analysis of briefs on the merits and consideration by this Court. Amici curiae, therefore, respectfully request that the petition of American Transfer & Storage Co. for a Writ of Certiorari be granted.

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November ____, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of November, 1980, three copies of the foregoing brief of amici curiae were mailed, postage prepaid, to both Carl David Adams, of Adams, Mims & Verpahl, Campbell Centre II, Suite 255, 8150 N. Central Expressway, Dallas, TX 75206, counsel for the respondent, and to Duncan Boeckman, of Golden, Potts, Boeckman & Wilson, 2300 Republic National Bank Tower, Dallas, TX 75201, counsel for petitioner.

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